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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Louisiana Power & Light Company (sometimes hereafter "Power Company"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 3, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A9), is reported at 373 F. 2d 870. Denial of rehearing was without opinion. The opinion of the District Court (Appendix B, *infra*, pp. B1-B26) is reported at 225

F. Supp 657. The judgments of the Court of Appeals are reproduced as Appendix C hereto.

JURISDICTION

The Opinion of the Court of Appeals was filed on March 6, 1967, a timely petition for rehearing was denied on June 23, 1967, and the judgment of the Court of Appeals was entered on July 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked because of diversity of citizenship, the City of Thibodaux (sometimes hereafter "City") being a citizen of Louisiana and Petitioner being a citizen of Florida.

QUESTIONS PRESENTED

1. Does a vested franchise right have Constitutional protection against impairment of the obligation of contract?

2. Do the due process clauses of the United States and Louisiana Constitutions protect against the taking by a municipality of physical facilities and franchise rights without compensation therefor?

3. May a Federal Court sitting in a diversity of citizenship case permit an untimely filing (or no filing) of a deposit by an expropriating agency in the light of Federal Rules of Civil Procedure 71A (j) and (k) and 69, when there is a State law requiring that a deposit be made in a time certain after judgment?

4. In a diversity action based upon State eminent domain law requiring judicial determination of whether a taking is "necessary for a public purpose," when no showing or presumption of public purpose exists in the record, is the District Court required to follow State law and make

a specific finding on public purpose, or, if Federal law applies, is a determination of public purpose under the Fourteenth Amendment a judicial or a legislative function?

STATUTES INVOLVED

The statutes directly involved are: Rules 69 and 71A (j) and (k) of the Federal Rules of Civil Procedure; Louisiana Revised Statutes, Title 19, Section 101 et seq.; Louisiana Constitution, Artcile I, § 2, and Article IV, § 15; U. S. Constitution, Fourteenth Amendment; U. S. Constitution, Article I, § 10; Louisiana Revised Statutes, Title 33, § 151 et seq.; and § 171 et seq.

The above statutes appear in Appendix D hereto at pages D1-D13.

STATEMENT

This expropriation suit was instituted by the City in February 1957 in a State district court. The Power Company invoked federal diversity jurisdiction by reason of it being a citizen of Florida and the City a citizen of Louisiana, and removed the case to Federal District Court.

The District Court below appointed a commission to hear the evidence on quantum. Pursuant to full hearing, that commission issued a Report that, as of May 1, 1961, the physical facilities being taken were worth $165,654; that the franchise rights were worth $317,031; that severance damages were in the amount of $17,380; that consequential damages were in the amount of $99,575; and that the total award should be $599,640 (R. 880)

Because of a vacancy created when Judge J. Skelly Wright was elevated to the Court of Appeals for D.C., there was a lapse of several months in the progress of the case. That fortuitous lapse resulted in factual develop-

ments showing that growth projections of City engineers and Petitioner's expert witness were reasonable and accurate. Those factual developments consisted of substantial growths in customers and in revenues. Armed with that proof, Petitioner showed, on hearing of motions for new trial, that it was entitled to an award for its franchise rights based on the present value of future growth, an award which the commission had originally refused. (R. 985 et seq.) The District Court accordingly amended the commission award by adding an amount for the present value of future growth in the sum of $781,918, making the total award $1,381,558, and final judgment was rendered for that amount. (R. 1048)

Although the City appealed, no deposit of the award was made into the registry of the District Court, and, based upon a requirement in State law (La. Revised Statutes, Title 19, Section 107) that deposit be made within six months after judgment, Petitioner moved for dismissal of the appeal. Petitioner also moved for dismissal on ground that there had not been any showing made of necessary public purpose for the taking at any stage of these proceedings.

The Court of Appeals made no ruling on these motions to dismiss until it issued its opinion on the merits of the appeal, in which opinion both motions were denied. The Court affirmed the District Court judgment except as to the award for present value of future growth, all of which it excised. The basis for that reduction was a holding that the Power Company had no right under its franchise granted by Lafourche Parish (County) to serve any new customers in the area annexed by the City and which area was the subject of this expropriation, but could only continue serving those customers being served at the time of

the annexation. The net effect of that holding would be that the proven value of future growth within the Power Company's valid franchise would be taken without any compensation, and the City would be taking some $78,000 in physical facilities and about 88 customers added since May 1, 1961, (the time when valuation of facilities and franchise rights was originally calculated), without making any payment therefor.

REASONS FOR GRANTING THE WRIT

1.

THE IMPAIRMENT OF OBLIGATION OF CONTRACT

The Parish of Lafourche granted Petitioner a parish-wide franchise in 1927 which, at the time of hearing before the commission below, had some 64 years remaining. That franchise was accepted by Petitioner and exercised, there being some 828 customers served in the area in dispute at the time of hearing below. The Court of Appeals has held, in effect, that the 1954 City ordinance of annexation of the subject area and/or the City resolution of expropriation dated November 27, 1956 permits a reduction or diminution of Petitioner's franchise to the extent that it has no right to serve any **new** customers in its franchised area, but only such customers as it was already serving at the time of annexation.

That holding is in direct conflict with some of the best settled decisions of this Court, decisions which have established that a franchise, when accepted, is a vested contractual right. *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819); *St. Tammany Water Works v. New Orleans Water Works*, 120 U.S. 64 (1887); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S.

58, 33 S. Ct. 988 (1913). The holding is even more directly in conflict with those decisions that say a vested franchise is a contract protected from impairment of its obligations by Article I, Section 10 of the United States Constitution. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885); *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 32 S. Ct. 572 (1912); *Grand Trunk Western Railway Co. v. South Bend*, 227 U.S. 544, 33 S. Ct. 303 (1913). The above holding is further directly in conflict with *Russell v. Sebastian*, 233 U.S. 195, 34 S. Ct. 517 (1914), wherein this Court held that the nature of a franchise was such that,

> "When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language."

Identically here, the Petitioner's franchise cannot be viewed as becoming a binding right only customer by customer or foot by foot of cable. It was a binding right from the moment it was accepted by exercise.

The *Russell* case, *supra*, also makes clear that the Court of Appeals cannot rely on a state court ruling which interprets state or municipal legislation in such a way as to effect an impairment of the obligation of contract.

While it is true that Petitioner's parish-granted franchise of 1927 was taken subject to Louisiana law then in existence, the Court of Appeals was quite clearly in error to construe any such law as warrant for restricting Petitioner's franchise upon annexation to just those customers then served.[1] First, it must be noted that the 1954 annexa-

[1] The Court of Appeals error is not diminished by its reliance on a State Court of Appeals case, *Town of Coushatta v. Valley Electric Membership Corp.*, 139 So. 2d 822 (1962). That case is significantly distinguishable. Principally, the real point of law there was that the co-

Continued

tion ordinance and the 1956 expropriation resolution by the City were both many years after petitioner's franchise was granted in 1927. The source of the annexation ordinance was Act 315 of 1946 (R.S. 33:171, et seq.), also many years after petitioner's franchise had been granted. Secondly, even if *arguendo* an alternative annexation statute were considered, R.S. 33:151 et seq. (being Act 105 of 1892), together with R.S. 19:101 et seq. (being Act 111 of 1900, both of which antedate Petitioner's franchise, there would still be no justification for the holding below, there being not the slightest suggestion in either of those statutes of impingement or restriction on vested contract rights by annexation or expropriation. Thus do we inevitably reach *Detroit United Railway v. Michigan*, 242 U.S. 238, 61 L Ed. 268 (1916). There this Court squarely held that annexation statutes passed subsequent to a franchise grant could not impair the obligations of that contract. In principle, to the same effect is *East Louisiana RR Company v. City of New Orleans, supra.* Moreover, *Detroit United Railway* also held in accord with *Russell, supra*, that impairment was attributable to the construction of those annexation statutes as well:

> "But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905

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[1] (Continued)
operative being enjoined from serving a municipally annexed area despite its parish franchise *had not exercised that franchise* in that it was serving no customers in the annexed area prior to annexation. Consequently, the franchise was not a vested contractual right and the municipality was thus privileged not to give it effect. McQuillin, Municipal Corporations, Vol. 12 (3d Ed.), Section 34.06; *City of New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41 (1888); *East Louisiana R.R. Co. v. New Orleans*, 46 La. Ann. 526 (1894). To interpret the *Coushatta* case otherwise would do violence to the above well-established principle of franchise law as restated by McQuillin. Such an interpretation would do mischief by inviting the taking without compensation of important franchise rights through the device of annexation. Moreover, *Coushatta* is at odds in principle with a long-established Louisiana Supreme Court decision, *State ex rel. Jefferson City Gas Light Co. v. City of New Orleans*, 41 La. Ann. 91 (1889).

and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to those subsequent laws. Assuming what in effect is conceded, that the village and township franchises constituted contracts within the protection of the Federal Constitution, the force of the decisions was to abrogate the rights acquired by plaintiff in error through its acquisition of the suburban lines, not merely because of the assent of the owners of the city lines to the ordinances of January 3, 1889, but because of the combined effect of those ordinances and the acts of the legislature of Michigan that thereafter extended the city limits. It is true that no question is or can be here made respecting the authority of the legislature to add new territory to the city; and it is likewise true that the annexation acts contain no reference to existing contracts, nor any specific mention of the subject matter of street railway rights. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."

The holding of the Court of Appeals is thus in direct conflict with the *Detroit Railway* case. In view of the many conflicts with decisions of this Court herein described, it is of no particular moment that the decision below is also in conflict with another decision of that Court, *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 256 F. 2d 83 (1958), vacated on other grounds.

2.

THE TAKING WITHOUT COMPENSATION

On the motion for new trial in the District Court, it was shown that during the period from the original valuation in April 1961 to September 30, 1962, there had been a growth of 42 customers and a consequent increase in revenues. (R. 987) Of course, by 1967, when this matter reached the Court of Appeals, there were even more customers (88) in the affected area, together with substantial plant additions ($77,754) to serve the additional customers. The Court of Appeals decision to excise any award on present value of future growth would leave Petitioner in the position of receiving no compensation for the additional customers and property additions.

A correction by this Court of the impairment of contract error will make academic the issue of compensation for facilities and customers added since 1961. But, if—perish the thought—that error is not corrected, then the question of a taking without compensation, contrary to U.S. and Louisiana Constitutional protections, inescapably arises. It is too well settled to require extensive citation that a franchise is a vested property right (*Frost v. Corporation Commission*, 278 U.S. 515, 49 S. Ct. 235), and property is protected Constitutionally from being taken without compensation. *Hot Springs RR Company v. Williamson*, 136 U.S. 121, 10 S. Ct. 955 (1890).

The record here is clear that the award thus far granted relates to values set as of May 1961 and does not include the facilities and customers since added. Judge Wright contemplated that such additions would receive an additional value. (R. 125) The error by the Court of Appeal regarding the City's failure to make timely deposit, discussed hereinafter, relates to this issue. La. R.S., Title

19, § 107 sets up an arbitrary time limit of six months after judgment for the municipality to make deposit of the amount decreed to be paid. That is a sensible rule in that its observance would obviate a utility company being placed in a position of adding facilities and customers after judgment — which it must do in Louisiana as a public service corporation — for which it does not get paid or, alternatively, must seek relief in the U. S. Supreme Court. Had the City here deposited the amount decreed and taken the Petitioner's system, customers, and rights to serve in the City, then there would have been no need for this plea for relief from an unconstitutional taking without compensation, since the City would have been adding the facilities and serving the new customers.

3.

THE QUESTION OF DEPOSIT AND F.R.C.P. 71A (j) and (k) and 69.

When this Court had before it and considered this case previously under its 1959 decision rendered in the case of *Louisiana Power & Light Company v. City of Thibodaux*, reported at 360 U.S. 25, it recognized fully the principle of comity in diversity of jurisdiction cases, requiring the Federal District Court sitting in this case to follow the Louisiana law on eminent domain, as may be interpreted by the State courts. Petitioner's complaint here is that the Court of Appeals vastly departed from the State law by its failure of refusal to apply the significant and pertinent provisions of the Louisiana statute on eminent domain. Specifically, the Court below refused to maintain Petitioner's motion to dismiss this case on appeal by the City, said motion being based on Louisiana law making the judgment of null and void in its entirety due to the City's neglect or refusal to make a timely post-judgment deposit

of the amount stated therein, as required by Louisiana Revised Statutes, Title 19, Section 107, providing as follows:

> "Whenever any gas, electric light, or water works plant encumbered with mortgages or privileges of any kind is expropriated by any municipality, it passes to the municipality free and clear of all incumbrances. However, the amount decreed to be paid therefor shall be paid by the corporation into the court within six months from the date of final judgment therein and distributed to the mortgage and privileged creditors according to their priority. In the event the municipal corporation fails to pay the amount fixed by the judgment of expropriation within six months after its rendition, the judgment becomes null and void and the municipality is liable for all damages suffered by reason of its failure to comply with the terms of the expropriation judgment."

"Shall" in Louisiana is mandatory, not permissive. La. R.S. 1:3.

The judgment of expropriation fixing the amount of the award for the mortgaged property of Petitioner was rendered by the Federal District Court on August 26, 1964 and filed on September 1, 1964. The City neither obtained a stay order from that final judgment nor made the post-judgment deposit of the amount fixed by said judgment within the time period before forfeiture of the said judgment as a nullity under Louisiana law.

On January 27, 1966, the Petitioner filed with the court below a motion to dismiss the appeal of the City on ground that the judgment on which the appeal was taken is null and void due to the City's default in not making the post-judgment deposit required in eminent domain cases

under and pursuant to the Louisiana statute relied upon by the City in filing this suit. The initial response of the Court of Appeals to this motion was merely a minute entry on February 18, 1966, to the effect that the motion to dismiss would be "carried with the case". The only other reference by the Court below to Petitioner's motion to dismiss this case on appeal based upon the nullity of the final judgment of expropriation under Louisiana law is a brief comment in Footnote Three of the lower court's opinion, as follows:

> "The other motion is based on the theory that the city has defaulted by not making a post-judgment deposit pursuant to the requirements of La. R.S. § 19:107, where mortgaged property is involved. This motion is also denied. The parties stipulated in 1957 that the proceeding would be governed by Rule 71A, F.R. Civ. P. That rule contemplates pre-judgment deposits and also permits post-judgment deposits. Cf. *Atlantic Seaboard Corporation v. Van Sterkenberg*, 4 Cir. 1963, 318 F. 2d 455; *United States v. Hirsch*, 2 Cir., 1953, 206 F. 2d 289. These deposit provisions are not applicable in the circumstances of this case." [373 F. 2d 870, at 871, fn. 3]

Although the Court below alludes to the stipulation of the parties to be governed by Rule 71A of the Federal Rules of Civil Procedure, it is significant to note that its statement concerning the effect of that Rule is incomplete and completely erroneous. Initially it must be observed that the Notes of the Advisory Committee show that the Federal Courts sitting in diversity cases must follow state law as to deposits when such deposits are required thereunder. As well stated in Note to Subdivision (j):

> "Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United

> States, see U.S.C.A., Title 40, [former] § 258a; U.S.C.A., Title 33, § 594—acquisition of title and possession statutes referred to in note to subdivision (a), *supra*. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§ 209-216. For discussion of the function of default and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States v. Miller*, 1943, 63 S. Ct. 276, 317 U.S. 369, 87 L. Ed. 336, 147 A.L.R. 55, rehearing denied 63 S. Ct. 557, 318 U.S. 798, 87 L. Ed. 1162 (judgment in favor of plaintiff for overpayment ordered)."

and Note to subdivision (k):

> "Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern."

In reading the cases of *Atlantic Seaboard Corporation v. Van Sterkenberg*, and *U. S. v. Hirsch*, *supra*, cited by the Court below, it is quite evident that, while the said Rule contemplates pre-judgment deposits, it does not, on the other hand, permit untimely post-judgment deposits unless there is no other statute requiring such deposits to be made. Only in those cases where the law is silent may the Federal courts permit a post-judgment deposit at any time following the entry of the judgment of expropriation while an appeal is pending. See *U. S. v. Hirsch*, 206 F. 2d 289, at 294-295 (2nd Cir. 1953):

> "Hirsch argues that the deposit was not in accord with the Declaration-of-Taking Act, 40 U.S.C.A. § 258a. We agree, since the deposit was made after judgment. But we consider that contention of no significance. For we have here the ordinary case where, without recourse to a statute, a judgment-debtor tenders, by a deposit in court, with leave of the court, for the benefit of the judgment-creditor, all or part of the amount due under the judgment, at the same time appealing. The deposit, whether or not the judgment-creditor draws it down, is deemed payment pro tanto. If a judgment is reversed on appeal, the judgment-debtor becomes entitled to restitution of money he paid on the judgment; he has the right whether or not he asserted that he had when he paid the money."

See also *Atlantic Seaboard Corporation v. Van Sterkenberg*, 318 F. 2d 455, at 460 (4th Cir. 1963):

> "We think the Court had abundant authority for its order. It is true that Rule 71A (j) appears to refer only to pre-judgment deposits 'required by law as a condition to the exercise of the power of eminent domain * * * [or] permitted by statute.' Inherently, however, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises, and, it may, for that purpose and for the protection of the owner, permit or require the payment of the amount of the award into the registry of the court. There is no valid reason why an owner, dissatisfied with the amount of the award, should be allowed, by a fruitless and meritless appeal, to postpone indefinitely the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps, irreparable, damage, all without risk of further loss or injury to the owner."

In the instant case, however, the Louisiana statute under which the City proceeds clearly makes a timely post-

judgment deposit mandatory under penalty of forfeiture of the judgment of expropriation as null and void.

Under the judicial interpretations of Rule 71A, more particularly sub-paragraph (j), post-judgment deposits are permissive by the courts **only in the absence of other law applicable thereto.** The lower court erred in failing or refusing to grant Petitioner's motion to dismiss the appeal based upon the nullity of the judgment of expropriation under the **mandatory** provisions of Louisiana law requiring post-judgment deposits in eminent domain cases, because the Federal courts in diversity of jurisdiction cases are required to follow and apply local or State law under the *Erie-Tompkins* doctrine and its progeny. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464 (1944); and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S. Ct. 1233 (1948).

The lower court's refusal to apply State law requiring the timely post-judgment deposit under penalty of forfeiture of the judgment of expropriation as null and void is in conflict with standing decisions of this Court. In the *Guaranty Trust Co.* case, *supra*, this Court stated as follows:

> "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." [326 U.S. 99, at 108-109]

In *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, at 497 (1941), this Court stated that the legal effects of a

judgment should be determined by the local or State law, when Federal courts are exercising jurisdiction solely on the basis of diversity of citizenship.

In *Angel v. Bullington*, 330 U.S. 183, at 191-192 (1946), this Court stated:

> "The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Also, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949).

Further, the lower court's refusal to grant Petitioner's motion to dismiss the appeal, based upon the nullity of the judgment of expropriation due to the City's failure to make a timely post-judgment deposit as required by Louisiana law, is in conflict with a decision of another Court of Appeals. In the case of *Defoe v. Town of Rutherfordton*, 122 F. 2d 342, at 345, the Fourth Circuit Court of Appeals held that a Federal court exercising jurisdiction based on diversity of citizenship of the parties "may not arbitrarily accord to the municipality what is in effect a moratorium for the payment of its obligations" under a judgment where to do so would be in conflict with State law.

In addition to the error below in the unwarranted departure from the *Erie-Tompkins* doctrine and its progeny by failing to apply State law requiring timely post-judgment deposits in eminent domain proceedings, this Court should also consider the serious question involving proper administration of the Federal judiciary under Rule 69 of the Federal Rules of Civil Procedure.

Rule 69 applies to judgments rendered by the Federal district courts. *U. S. v. Hacket*, 123 F. Supp. 106, at 107 (D.C. Mo., 1954), wherein it is stated:

> "By virtue of Rule 69 of Federal Rules of Civil Procedure, 28 U.S.C.A., the procedures on execution of a judgment of a Federal Court are those that accord with the practice and procedures of the state in which the Federal Court is held."

U. S. v. English Const. Co., 95 F. Supp. 763, at 764 (D.C. N.Y. 1951), wherein it is stated:

> "The enforceability of a judgment of a United States District Court depends upon the practice applicable to a judgment of the court of the state in which the District Court is located."

Also, Barron and Holtzoff, Federal Practice and Procedure, §§ 1481-1482, pp. 525-529.

The lower court's refusal to grant Petitioner's motion to dismiss this case at the appellate level when the judgment of expropriation was forfeited under the provisions of Louisiana law by the City's default and failure to make the timely post-judgment deposit raises a grave question as to the breakdown of the proper functioning of the Federal judiciary. Under Rule 69, the Federal courts are required to follow and apply the State law of procedure for the enforcement of judgments rendered by the courts in their exercise of diversity jurisdiction, and in this case

the lower court erred in failing to enforce the penalty of forfeiture of the judgment of expropriation as null and void in accordance with State law due to the City's default by failing or refusing to make mandatory post-judgment deposit. Thus, the decision below raises a vital question as to the proper function of the Federal judiciary in eminent domain cases based on local or State law, and clarification by this Court is needed and required.

4.

THE ERROR RE: PUBLIC PURPOSE

Upon abstention by the District Court in this case, the City brought a declaratory judgment action in State court to determine its "right" to expropriate the facilities of Louisiana Power & Light Company under Louisiana Revised Statutes 19:101 et seq. The Louisiana Court of Appeals for the First Circuit, in ruling on the action, specifically noted that its ruling was solely on the "right" of the City to expropriate, and the court made no ruling on the question of the public purpose for the taking, stating:

> "Appellant next contends that there has been no finding of necessity for this appropriation. On this point, the petition for expropriation alleged that it was ' * * * necessary for the public interest * * * and necessary in the public interest.' The requirement under Act 111 of 1900 is that the expropriation be ' * * * thought necessary to the public interest by the mayor and council of municipality.' While the petition satisfies the requirements of the Act, we are not, in fact, concerned therewith as the only question before this Court is the right of the City to expropriate under Act 111 of 1900, now L.S.A.-R.S. 19:101, et seq., within the city limits." [126 So. 2d 24, at 42]

Thereafter, at the trial on the merits of this matter.

before the District Court, the **only** evidence adduced with respect to necessity for a public purpose on the part of the City was its admission against interest in connection with its 1956 bond issue, as follows:

> "The City can negotiate freely with the Power Company, since the connection of this new area to the Municipal System is not essential to provide adequate debt-service coverage for the present bond issue." (Seal Ex. C-2, p. 12)

The evidence of record indicates that the facilities to be taken by the city for use in its proprietary capacity would serve the same customers being served by Louisiana Power & Light Company at rates higher than those charged by the Company. Absent any contrary showing in the record, it is submitted that the evidence establishes *prima facie* that the taking is contrary to the public interest. Yet the District Court and the Court of Appeals both failed to rule on the question of necessity for a public purpose.

A.

Louisiana Law Requires Judicial Determination.

Article I, § 2 of the Louisiana Constitution provides that, "Private property shall not be taken except for public purposes." Article IV, § 15 provides, "Nor shall vested rights be divested, unless for purposes of public utility."

The Louisiana courts have consistently held that the quoted language from the State Constitution requires a determination by the courts of the state in expropriation proceedings that there be a finding that the taking is "necessary for a public purpose," and the owner who claims lack of public necessity is entitled to have the question passed upon by a judicial tribunal. *Calcasieu and Sou. Ry. v. Bel*, 254 La. 269, 69 So. 2d 40 (1953); *City of Westwego v. Marrero Land and Imp. Association*, 221 La. 564, 59 So.

2d 885 (1952); *Parish of Iberia v. Cook*, 238 La. 697, 116 So. 2d 491 (1959); *City of New Orleans v. Maeglich*, 169 La. 1, 126 So. 675 (1930); *City of Shreveport v. Kansas City Southern Ry. Co.*, 169 La. 1085, 126 So. 667 (1930); *Kansas City Southern Ry. Co. v. Meyer*, 166 La. 663, 117 So. 765 (1928); *New Orleans Terminal Co. v. Teller*, 113 La. 733, 37 So. 624 (1904); *Williams v. Judge*, 45 La. Ann. 1295, 14 So. 57 (1893); *United Gas Pipeline Co. v. Blanchard*, 149 So. 2d 615 (La. App. 1963), cert. den., 244 La. 135, 150 So. 2d 590 (1963); *Louisiana Power & Light Company v. Charpentier*, 165 So. 2d 614 (La. App. 1964).

In *United Gas Pipeline Co. v. Blanchard, supra*, the appellate court stated at 149 So. 2d 616:

> "The determination of the question in expropriation cases as to whether taking is for public purposes or use is **strictly** a judicial function and the determination of the question is the **duty** of the court." (Emphasis added)

Absent a State Constitutional amendment to the contrary (such as that contained in Article VI, § 19.1 of the Louisiana Constitution, authorizing State Highway Department determination of necessity), Louisiana courts are thus **required** to make a specific finding on necessity for a public purpose or use in expropriation cases such as this. It is submitted that no less stringent a requirement should be placed on a Federal District Court sitting as a State Court in a diversity action.

In *Hairston v. Danville and Western Ry. Co.*, 208 U.S. 598, 28 S. Ct. 331 (1908) this Court held that, where the state law of Virginia permitted no exercise of the right of eminent domain except for public uses, a general judgment of condemnation by a state court will be assumed to

be a judicial determination of "necessity for a public use" even if there was no specific finding of that fact. The situation is different, however, in the instant case in that Louisiana law requires a specific judicial determination that the exercise of the right was "necessary for a public purpose or use." Accordingly, to permit a Federal District Court to enter a judgment without such a specific determination would violate the rule of *Erie Ry. Co. v. Tompkins, supra; Guaranty Trust Co. of New York v. York, supra; Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657 (1946); and *Ragan v. Merchants Transfer and Warehouse Co., supra*, that a Federal Court in a diversity case is merely sitting as another court of the state.

B.

State or Federal Interpretation of "Necessary for a Public Purpose" under Fourteenth Amendment.

This Court has held that a State legislature may confer upon a municipality the authority to determine the necessary public purpose for itself. *Josland Co. v. City of Providence*, 262 U.S. 668, 43 S. Ct. 684 (1923). But such determination must be made in accordance with State law. *Bragg v. Weaver*, 251 U.S. 57, 40 S. Ct. 62 (1919). As indicated above, Louisiana law requires a judicial determination that necessity for a public purpose exists, and under the teachings of *Erie* and its progeny, the District Court should be required in a diversity action such as this to follow State law in making such a determination. The court below chose not to make a finding on the question of public purpose, and its only justification therefor would appear to be the holding of this court in *Rindge v. Los Angeles County*, 262 U.S. 700, 43 S. Ct. 689 (1923), and *Milheim v. Moffat Tunnel Imp. District*, 262 U.S. 710, 43 S. Ct. 694 (1923), to the effect that Federal courts are

vested with the duty of determining for themselves what is a public purpose under the due process clause of the Fourteenth Amendment, and are not bound by the rulings of State courts thereon.

Thus, the failure of the District Court to make a finding on public purpose in this diversity case based on Louisiana law clearly poses a conflict as to whether the court is bound by Federal or State interpretations of what is required for due process under the Fourteenth Amendment. It is submitted that the lower court's choice of following what would be assumed to be Federal law by failing to enter such a ruling directly conflicts with the rule of *Erie*.

C.

Legislative or Judicial Determination of "Public Purposes."

It is well settled that the Fourteenth Amendment to the Federal Constitution has established a requirement that property must be taken for public purpose. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896); *Davidson v. New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1877).

In applying the provisions of the due process clause of that amendment to State law eminent domain proceedings, a further problem has arisen on whether legislative or judicial determination is required on the question of whether the taking is "necessary for a public use." The scope of judicial power to determine a "public use" in a Fourteenth Amendment controversy is the subject of conflicting decisions by this Court. In *Hairston v. Danville and Western Ry. Co.*, *supra*, this Court stated that, "The nature of uses, whether public or private, is ultimately a **judicial** question," in a Fourteenth Amendment context.

In *Hairston*, this Court assumed that judicial determination of necessity for a public purpose was implicit in the Virginia State Court's general judgment of condemnation. However, Louisiana state law requires a specific judicial determination on this point, as discussed above. On the other hand, in *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 66 S. Ct. 715 (1946), stating specifically that it was not attempting to ascertain whether the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies is the same as under the Fifth Amendment, a majority of this court held in a decision involving the Federal Government that, "It is the function of * * * [the legislative branch] to decide what type of taking is for a public use."

The Court of Appeals in the instant case appeared to rely on this Court's holding under the Fifth Amendment that legislative determination of public purpose is all that is required, rather than following the ruling of the Court in the Fourteenth Amendment case of *Hairston* requiring a judicial determination of the public purpose question, in a manner similar to Louisiana law.

In summary, the action of both lower courts in failing to rule on the question of whether the taking was "necessary for a public purpose" raises the following questions:

(1) Whether State or Federal guidelines should be followed in diversity actions in determining whether a specific finding of public purpose is required;

(2) Whether State or Federal guidelines should be followed in determining what is "necessary for a public purpose" under the due process clause of the Fourteenth Amendment; and

(3) If Federal law is to be applied, the additional question of whether such a determination is a judicial or legislative function under the due process clause of the Fourteenth Amendment.

These are questions as to which conflicting decisions appear to have been rendered by this Court, and they are questions important to the orderly functioning of Federal diversity jurisdiction within the framework of Federal-State eminent domain proceedings under the *Erie* rule.

* * * * *

In addition to and apart from the significant conflicts with this Court's decisions, and the important questions relating to Federal judicial functions in eminent domain cases based on State law, we submit that the issues here have even more importance. The questions raised by a municipality expropriating an electric distribution system from an electric utility company are entirely matters of first impression in Louisiana and virtually throughout the nation. The issues as to value of future growth; as to whether a public purpose is achieved in simply transferring ownership of an electric system to another person charging higher rates to the same customers; as to whether a municipality should be permitted to carry on a lengthy litigation without putting any deposit forward while the utility company is under regulatory requirements to continue building facilities and serving customers for none of which it may be paid if the municipality later decides the original "price was right"; are all of vital importance to the utility industry, to the municipalities and similar governmental bodies, and to the consumers, in Louisiana and across our whole nation. The guidance of this Court on these matters is needed and indicated.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX A

BELL, Circuit Judge:

The City of Thibodaux, Louisiana, appeals from an award to the Louisiana Power & Light Company of $1,379,558 as just compensation for properties of the power company within the city limits of Thibodaux which properties were expropriated by the city acting pursuant to La.R.S. § 19:101.[1]

This is the most recent phase of the protracted litigation between these parties which began in 1957 in the state court. Having been removed to the federal court under its diversity jurisdiction, the next four years were spent in having the question resolved of the right of the city to expropriate.[2] Finally, in 1961, a commission was appointed under Rule 71A, F.R.Civ. P., to determine the issue of just compensation. The award by the commission, with which both parties were dissatisfied, was adjusted upward on review by the District Court. Only the city appeals.[3]

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[1] La. R.S. § 19:101

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the major and council of the municipality. * * *"

[2] The District Court abstained on the basis that the right involved, arising as it did under the power of eminent domain, was one for the state courts. City of Thibodaux v. Louisiana Power & Light Company, E.D., La., 1957, 153 F.Supp. 515. We reversed. City of Thibodaux v. Louisiana Power & Light Company, 5 Cir., 1958, 255 F.2d 774. The Supreme Court reversed our decision and held that abstention was proper. Louisiana Power & Light Company v. City of Thibodaux, 1959, 360 U.S. 25, 79 S.Ct. 1070, 2 L.Ed.2d 1058. A declaratory judgment action was then initiated in the Louisiana state courts. It was determined that the city could expropriate the properties in question. City of Thibodaux v. Louisiana Power & Light Company, La.App., 1st Cir., 1960, 126 So.2d 24.

[3] The power company has filed two motions in this court to dismiss the appeal. The first is based on a contention that there has been no proof of necessity as required under the expropriation statute, La.R.S.

Continued

The expropriation was of the power company's facilities and franchise in an unincorporated area of a parish which had recently been annexed by the City of Thibodaux. The award by the commission was as follows:

Physical Properties	$165,654.00
Franchise—Value of Present Income	315,031.00
Severance Damages	17,380.00
Consequential Damages	99,575.00
Total	$597,640.00

We affirm as to the award for physical properties, severance damages and consequential damages. We affirm as to the capitalization method used in computing the value of the franchise, and as to the award based on present income. The District Court granted an additional amount of $781,918 for franchise value based on future growth. We reverse as to this award.

The amount awarded for physical properties is not contested by either party. The amount of the severance damages is not contested by the city. The power company indicates its disagreement with the amount of the award as a matter of merit but we reject the suggestion. The

[3] (Continued)
§ 19:101. This question was settled by the Louisiana Court of Appeals. City of Thibodaux v. Louisiana Power & Light Company, 126 So.2d 24, 43, supra. See State Through Department of Highways v. Guidry, 1960, 240 La. 516, 124 So.2d 531. Moreover, it comes too late. Kirby Lumber Corporation v. State of Louisiana, 5 Cir., 1961, 203 F.2d 82. It should have been presented by cross-appeal. The other motion is based on the theory that the city has defaulted by not making a post-judgment deposit pursuant to the requirements of La.R.S. § 19:107, where mortgaged property is involved. This motion is also denied. The parties stipulated in 1957 that the proceeding would be governed by Rule 71A, F.R.Civ.P. That rule contemplates prejudgment deposits and also permits post-judgment deposits. Cf. Atlantic Seaboard Corporation v. Van Sterkenberg, 4 Cir., 1963, 318 F.2d 455; United States v. Hirsch, 2 Cir., 1953, 206 F.2d 289. These deposit provisions are not applicable in the circumstances of this case.

power company took no appeal and the question is not before us. Kirby Lumber Corporation v. State of Louisiana, 5 Cir., 1961, 193 F.2d 82.

The city contests the award for consequential damages but the award has an adequate evidentiary foundation, and is clearly in order under the jurisprudence of Louisiana. It was for damages suffered by the company through the carving out of the Thibodaux facilities from its system, thus leaving loose ends of its remaining facilities hanging in the adjacent areas. The situation is not unlike the allowance of compensation to adjacent property owners in Louisiana highway condemnation cases for amounts necessary to construct ramps and bridges across ditches paralleling new highways. See City of New Orleans v. Giraud, 1959, 238 La. 278, 115 So.2d 349; State Department of Highways v. Burleigh, La.App., 1964, 160 So.2d 782; Louisiana Highway Commission v. Treadaway, La.App., 1937, 173 So. 209. These damages are not in the class of moving expenses or damages for inconvenience as are referred to in McMahon v. St. Louis A. & T. R. Co., 1889, 41 La. Ann. 827, 6 So. 640; or Rapides Parish School Board v. Nassif, 1957, 232, La. 218, 94 So.2d 40.

This leaves two questions for decision. The first is whether it was proper for the commission to determine the value of the franchise on a capitalization of present income basis. The second involves whether the power company was entitled to any award at all for its franchise based on the value of future growth.

I.

We hold that capitalization of present income was a proper approach to the question of market value of the franchise under the circumstances of this case.

The amount of the award due the power company is a state question arising under Art. I, § 2, Louisiana Const., 1921, which provides that private property may be taken or damaged for public purposes but only after payment of just and adequate compensation. The fair market value of the property is the means for ascertaining just and adequate compensation under the Louisiana Constitution. State through Department of Highways v. Hub Realty Company, 1960, 239 La. 154, 118 So.2d 364, 365. The use of comparable sales is the normal method for determining market value but here were no comparable sales to be used. In such event value must be ascertained by considering other factors. Housing Authority of New Orelans v. Boudwine, 1954, 224 La. 988, 71 So.2d 541. Thus it was that the commission used the method of capitalizing the net earnings of the properties being expropriated to arrive at the value of the franchise.

The city concedes, as it must, that earnings may be considered in valuating the worth of an enterprise. However, it is argued that capitalization of earnings may not be the sole basis for judgment.[4]

In order to capitalize net income it is necessary to estimate the amount of future net income and this involves estimating gross income and expenses over a long period

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[4] Capitalization has been defined as follows:

"* * * When the appraiser talks about capitalization of net income he means, in effect, what sum invested at a particular rate of return or interest will yield this net income * * *" Nichols on Eminent Domain, (1 vol. ed.), § 149.

"* * * What is it. The capital value theory of appraising affirms that the value of property tends to be set by the expected net yield to its owner. In the application of this theory the appraiser predicts the amount of future net income and applies appropriate discounts for interest. The process is known as capitalizing expected future income; it is simply, in effect, a process of discounting for interest. The result is the capitalized value of the property, * * *" Schmutz, Condemnation Appraisal Handbook (1964), p. 42.

of time. Then a capitalization or discount rate must be selected. It is obvious that the vagaries of future events, economic and otherwise, have great bearing on the certainty of a value based on capitalization. Nevertheless, the commission, having no comparable sales to use as a guide, arrived at the franchise value by first computing the net income from the Thibodaux operations for the most recent twelve month period, and then by capitalizing the amount of that income, $28,575 at 5.92%. The theory of capitalization was that the earnings would continue on this average over the remaining life of the franchise which was sixty-four years. This computation resulted in a capitalized value of the franchise of $480,685. The value of the physical properties, $165,654, was subtracted from this amount and the remaining $315,031 was assigned as the value of the franchise. The commission arrived at the net income figure by allocating system wide expenses on a prorated basis against Thibodaux revenues. The capitalization rate of 5.92% was the ratio of net income to net investment of the company for the twelve month period ending with April 1961.

As stated, the city contends that the practice of capitalizing earnings to arrive at enterprise value is not acceptable in Louisiana, citing Rapides Parish School Board v. Nassif, supra. In that case the school board expropriated an owner's property in order to remove the building and construct a school. The court held that the owner was entitled to fair market value computed on the value of the land plus value of the building on a cost of replacement less depreciation basis. The owner urged that he was entitled to a valuation of the building on the basis of capitalized rental income plus the value of the land. The court rejected this contention by stating that rental income and the value of the business are not sole criteria but are

material to the extent that they assist in determining the fair market value.

The city reads this case to mean that capitalization may never be the sole criterion even when no other evidence is available. We think this is an overbroad reading since it is plain from the decision that there were other value factors available.

Ours is the exact reading that the Louisiana courts have given the *Rapides Parish* case. Capitalization of income has been permitted in ascertaining value. See Orleans Parish School Board v. Paternostro, 1958, 236 La. 223, 107 So.2d 451, where a school board expropriated property and both parties utilized the capitalization process. The court's own expert witness employed it, but corroborated the capitalized amount by reproduction cost less depreciation plus land value. The Rapides Parish case is cited as approving capitalization as a criterion. In the case of Arkansas Louisiana Gas Company v. Louisiana & Ark. Ry. Co., La.App., 1964, 165 So.2d 317, the court held that it was proper to capitalize rentals in order to ascertain market value in an expropriation proceeding and this was the sole criterion used. It is clear then that it is not improper to use the capitalization process under the Louisiana law.

Fair market value as reflected by the capitalization process might be more definite if it could be checked or corroborated by other criteria such as comparable sales but here there were no other criteria. We hold that it was not error to use the capitalization process exclusively in such circumstances.

The power company urges that the commission made an apparent error in computation in determining the

net profit figure used. There is said to be a double count in certain expense items. This same contention was made to the commission and to the District Court to no avail. In addition to finding no factual basis for the assertion, the question is not before us since the power company took no appeal, Kirby Lumber Corporation v. State of Louisiana, supra.

II.

The question of awarding value to the franchise for future growth may be decided without reference to the evidence pertaining thereto and without reference to capitalization. The District Court added the sum of $781,918 to the commission's award for franchise value based on future growth. The commission had rejected any award for future growth on the conclusion that the evidence was insufficient. Any question as to the sufficiency of the evidence in this regard is expressly pretermitted. And the question presented must be distinguished from value, heretofore considered, based on the franchise as it had been developed to the date of valuation in 1961. We are here concerned only with what the future developments under the franchise might be. We hold that no such award was due as a matter of law in light of the settled Louisiana authorities.

On the appearance of this case is the Louisiana Court of Appeals, 126 So.2d 24, 33, supra, the court stated that the power company took its franchise from the parish in 1927 subject to the law of Louisiana permitting cities to annex adjacent territory and to expropriate utility properties therein. The franchise expressly excluded any territory within the limits of a municipality in the parish. The question before that court was the right of Thibodaux to expropriate the facilities, customers and franchise of

the power company as they then existed in the recently annexed territory. Whether the power company had a right to serve new customers, or stated differently, whether the franchise included future growth in addition to existing customers was not dealt with in that decision. However, two years later, in Town of Coushatta v. Valley Electric Membership Corporation, La.App. 1962, 130 So. 2d 822, the future growth question was squarely presented to the court. The Town of Coushatta had annexed territory which had been a part of a franchise granted by a parish, just as was the case here, and the power company thereafter sought to serve a new customer. The court held that the franchise holder had no right to serve the new customer in the municipality annexed part of its franchise but that it could continue, under the authority of City of Thibodaux v. Louisiana Power & Light Company, 126 So. 2d 24, supra, to serve its existing customers subject to its facilities and franchise being expropriated. The one new customer which the power company was enjoined from serving was precisely in the situation of what is alleged here to be a right to future growth. By a parity of reasoning, the holding of the *Town of Coushatta* case means that the power company here had no such right; hence, it was entitled to no compensation for future growth under its franchise. The District Court erred in making the award of $781,918 on this basis. The power company was entitled to the value of the franchise based on the business it was doing; but not on what it might do in the future. It accepted the franchise on this condition.[5]

There is one last tail end to the appeal. The city

[5] There is a suggestion of record in the affidavit of the power company president (R. 145, 151), that the franchise may have been amended by the city to include future growth in some annexed areas. The record is insufficient to establish this to be the case with respect to the specific area in question.

urges that the judgment is infected with over-all error because the District Court took judicial notice of the expropriation in 1963 of the facilities and franchise of an electric utility by the City of Lafayette, Louisiana. Looking at the amount paid and the number of customers, the court concluded that the award to the power company here was not inordinate. The court stated that it was not a comparable sale, and it is not shown that the court gave any weight whatever to this fact in approving those parts of the award by the commission which were approved. It is not shown that any weight was given to that expropriation in making the erroneous award for franchise value based on future growth. It appears only that the court was checking its own judgment out of an abundance of caution by looking to the *Lafayette* case. This action was not error.

Our conclusion then is that the judgment is affirmed in all respects save as to the amount awarded by the District Court under the franchise valuation for future growth. That sum, $781,981, must be eliminated from the judgment. The case must be remanded so that the judgment may be made to conform to this opinion.

Affirmed in part; reversed in part; remanded with direction.

APPENDIX B

FRANK B. ELLIS, District Judge.

On February 4, 1957, the City of Thibodaux, State of Louisiana, a duly incorporated municipality (hereinafter referred to as "City") brought suit to expropriate the electrical power distribution system of the Louisiana Light & Power Company (hereinafter referred to as "Power Company") within the corporate limits of the City pursuant to Louisiana Revised Statutes, Tit. 19:101, LSA, which reads in pertinent part:

> Any municipal corporation * * * may expropriate any electric light, gas or waterworks plant or property.

The Power Company removed the suit to the United States District Court for the Eastern District of Louisiana [1] premised on the original diversity jurisdiction of this Court since Power Company was a citizen of another State under 28 U.S.C. § 1332.[2] Answer was filed and the matter set down for hearing. By Minute Entry of May 15, 1957, it was stipulated that the seizure would be pursuant to Rule 71A F.R.Civ.P. and that a commission of three would be appointed to determine the value of the property, should that issue be reached. It was further agreed that Power Company would be heard on all its defenses at a special hearing.[3] Subsequent to the hearing the

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[1] 28 U.S.C. § 1441.

[2] Power Company's removal petition stated that it was a resident of the State of Florida and incorporated there. This allegation was sufficient for diversity under the Statute in 1957. Subsequently, by the 1958 Amendment to 28 U.S.C. § 1332, a corporation became a citizen, for diversity purposes, of the state of its principal place of business which in Power Company's case is Louisiana. However, the subsequent change does not now affect this Court's jurisdiction.

[3] Power Company's defenses generally stated, were that the act of

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District Judge then presiding stayed all further proceedings pending a determination by the Louisiana Supreme Court of the limited application of La.R.S. 19:101, LSA to the expropriation of the facilities of Power Company within the city limits of the City, on the grounds that the paucity of Louisiana law on the subject statute[4] advised reference of a crucial state law problem to the State Court.[5]

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[3] (Continued)
expropriation was unconstitutional as an impairment of contract under Section 10, Art. 1 U.S.Const. and that the statute, if property construed to countenance such a seizure was similarily unconstitutional. It was also urged that the procedure for condemnation proposed by the City was unconstitutional as a taking of property without due process. U.S. Const. Amend. 14, and that no finding of "necessity" for seizure had been made. The Power Company finally urged that under the statutes of the State of Louisiana a municipality could not seize only a portion of the Power Company, as it proposed to do, but seize the whole of the Company's property.

[4] The Statute, in its entirety, is as follows:

> La. R.S. 19:101 et seq. "Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and waterworks plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.
>
> "All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation."

[5] This legal problem grew, no doubt, out of technical progress and the rural electrification of the State of Louisiana. When the statute was passed as Act 111 of 1900 power companies normally served the public from within a municipality. With time and progress, the Power Company now has facilities the length and breadth of the State with generators and sub-stations serving municipalities now located outside the municipality. An opinion of the Attorney General of the State of Louisiana rendered October 10, 1951, stated that the City could not do what is sought to do here. The District Court, although neither party

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The Fifth Circuit Court of Appeals reversed the District Court on the grounds that abstention was unavailable and inappropriate under the circumstances.[6] The Supreme Court of the United States reversed the Fifth Circuit and affirmed the District Court's abstention of jurisdiction pending determination of the applicability of the statute by the Louisiana Courts.[7] Subsequently the right of the City to expropriate the property involved was confirmed by the Louisiana courts and the matter returned to the Federal District Court.[8]

A commission of three was appointed and ordered to take testimony and file a report which was to contain "not only the opinions as to value, but also the detailed considerations of which these opinions [were] based." On May 26, 1961, the District Court issued a "Charge to the Commission" setting out the considerations which were to govern the Commission in its determination of the value of the property to be expropriated. Both the City and Power

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[5] Continued
requested it, stayed the proceedings in the federal court so that a definitive judgment on state law could be made by the Louisiana State Courts. City of Thibodaux v. Louisiana Power & Light Co., E.D.La., 153 F.Supp. 515.

[6] The Fifth Circuit read the law as holding that abstention was appropriate when the action was equitable or the discretionary procedure desirable. It found neither in the case at bar. City of Thibodaux v. Louisiana Power & Light Co., 5 Cir. 255 F.2d 774.

[7] Granting certiorari "because of the importance of the question in the judicial enforcement of the power of eminent domain under diversity jurisdiction" 360 U.S. at 26, 79 S.Ct. at 1071, 3 L.Ed.2d 1058, the Supreme Court affirmed the application of abstention principally because of "the special nature of eminent domain" and the wise use of reference of the question to the State courts by the District Judge. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Fd.2d 1058. It is important to note that the constitutional defenses raised by Power Company, which had not found countenance in the District Court, Court of Appeals or the Supreme Court, were labelled "frivolous" in the dissent, 360 U.S. p. 33, 79 S.Ct. p. 1075, 3 L.Ed.2d 1058, and dismissed without more. If the parties still consider the issue live in this court, the point must be made now that these constitutional defenses are rejected as unsound. See City of Thibodaux v. Louisiana Power & Light Co., La.App., 126 So.2d 24, reh. den., Jan. 30, 1961, cert. den. Mar. 13, 1961.

[8] City of Thibodaux v. Louisiana Power & Light Co., La.App., 126 So.2d 24.

Company filed objections to the Charge and on June 6, 1961, the District Court entered an Amended Charge.[9] After the presentation and submission of proposed findings by the parties, the Commission filed its first report on August 21, 1961. Both the City and the Power Company took exception to the Commission's report and after a hearing the District Court, on February 8, 1962, referred the matter back to Commission for the purpose of answering certain specific interrogatories. On February 28, 1962, the Commission filed its Supplemental Report on valuation in response to the District Court's interrogatories. Once again the City and Power Company filed specific objections to the Supplemental Report. On March 27, 1962, the District Court overruled the objection of the City and Power Company to the Supplemental Report of the Commission. No formal judgment was entered. Thereafter the Commissioners' fees were fixed by the District Court.

Both the City and Power Company moved for a new trial[10] and on October 24, 1962, the matter was heard before the District Court as presently constituted, arguments being heard and the testimony of one witness for Power Company being heard. The matters presented were the correctness of the Commission's valuation of the expropriated property and the justification of the Power Com-

[9] The objections raised then have continued at varying degrees of intensity and in various forms ever since. Generally they center around, 1) the time at which the taking value was to be measured, 2) the value, or lack of value, of the franchise, 3) the value and significance of future growth of the Power Company, 4) the definition of severance and consequential damages.

[10] Motions for new trial are made under the Federal Rules within ten days after judgment has been entered. No judgment has been entered in this case. Rule 53(e) (2) provides for motions on objections to the Commission's reports. This procedure has been followed and determined by Minute Entries of March 27, 1962. At best this procedure must be called a Petition for Rehearing and this Court is constrained to observe that this petition was filed after the Honorable J. Skelly Wright had been elevated to the Court of Appeals. It seems appropriate at this point for this Court to observe that it gives great weight to the prior findings of this Court and the Commission.

pany's cost representing expert fees. It is the cross-motion for a new trial which is presently before this court for determination.

PART II

Before delving into the fact of this matter it is important to set out the limitations of the review of the Commissioners' findings on this cross-motion. Under the stipulated application of Rule 71A F.R.Civ.P., the Commission appointed by this Court was governed generally by Rule 53 F.R.Civ.P., and this court, in reviewing the findings of the Commission is bound by Rule 53(e) (2) F.R.Civ.P., which states in pertinent part:

> "(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings unless clearly erroneous. * * * The court after hearing [objections] may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

As to the limits of this Rule, Professor Moore has stated:

> "The 'unless clearly erroneous' provision of Rule 53(e) (2) is a mandate to the trial court in passing on the master's findings of fact, and prescribes substantially the same test which Rule 52(a) applies to the findings of fact of the District Court on appeal.
>
> "Although Rule 53(e) (2) is a mandate to the trial court, failure to observe the Rule will result on appeal in reversal or modification of the trial court's judgment. The master's findings must be read reasonably; and, although some are deficient, those that are adequate come within the provisions of Rule 53(e) (2), unless the report is rejected, modified, or recommitted."

Of course, it goes without saying that conclusions or applications of law are fully within the power of this Court to alter if it is demonstrated that the Commission was in error. To this extent, then, this Court must accept the report of the Commissioners unless clearly erroneous and modify or reject the report in whole or in part and apply the law properly if the Commission did otherwise.

The Power Company is a large public power utility serving Central and South Louisiana for the most part. Among its property holdings are the usual generators, sub-stations, lines, poles, and so forth, which make up a large integrated power complex. In the City of Thibodaux proper the only tangible equipment of Power Company is its ultimate distribution system made up principally of lights, poles, and wiring. The condemnation involved in this action is, as previously mentioned, limited to the corporate limits of the City. However, outside of the corporate limts are the generators and sub-stations of Power Company which supply the power to the lines and poles within the corporate limits. These extra-urban facilities of the Power Company are extensive in size and diversification of location, and are, in fact, what give the intra-urban facilities their value. In addition to its intra-urban property subject to seizure, the Power Company has a franchise to operate within the City which, when suit was filed, had 64 years to run. This the Power Company will lose by the expropriation. Moreover, the loss of the franchise necessitates the building of distribution facilities around the City in order to continue service to other areas of the State of Louisiana. Similarly the expropriation will render useless, in some degree, the extra-urban facilities of the Power Company which had formerly supplied the power to the intra-urban facilities. Lastly, Power Company loses the right to operate in and derive profits from

the customers within the City. As a consequence, the City is taking from the Power Company, and for which it must pay, four items:

a) The physical properties within the City:

b) A franchise.

c) The usefulness of certain extra-urban properties.

d) The right of passage through the City to serve other areas.

It was the valuation of these items which prompted the reference to the Commission and which brings this case, now, to its ultimate resolution at the trial court level.

In its initial charge to the Commission, the Court, in addition to general orders, set out the items to be valued by the Commission as follows:

a) Market values of the physical properties to be expropriated.

b) Market value of the Company's franchise rights in the territory affected.

c) Severance damages, if any.

d) Consequential damages, if any.

The general rule to be applied was the valuation as between a willing buyer and a willing seller, with certain important limitations. The facilities were presumed to be useful to the hypothetical buyer in their present location without substantial alteration. Even though the City could operate without a franchise, it was presumed that it would need the same franchise enjoyed by the Power Company. The franchise value might be judged by comparable sales and evidence of actual earnings. Guesses about future

profits were to be disregarded. The severance damages were to be considered by evaluating the total system prior to the expropriation and subsequent to it with the resultant figure being severance damages. The cost of relocating around the City was to represent the consequential damages. Both parties objected to this charge and after a hearing and submission of briefs the Court altered the charge in certain material aspects. In the Amended Charge to the Commission the market value was to be determined as at the time the proceedings reopened in this Court subsequent to the abstention. Evidence of future growth, "when proved to a reasonable certainty", could be considered in assessing value to the franchise. As to the consequential damages, the Commission was ordered to consider the benefit to the Company due to opening new areas of profit due to the new facilities in evaluating the cost of circumventing the City with the new lines and poles. With this Amended Charge before it, the Commission proceeded to take testimony and draft its first report.

On August 21, 1961, the Commission filed its first report. The Report itself demonstrates the extreme difficulty involved in the instant evaluation under the general jurisprudential rules of condemnation. The very nature of this expropriation, whose uniqueness counseled federal abstention in the first instance, precluded the use of similar sales in the area as a guiding factor as is usual in expropriation of real estate. The right of eminent domain is not exercised against small portions of large integrated power systems with sufficient regularity to permit the use of well-known tests of valuation. More to the point, the Commission found no evidence of comparable sales in the area. Consequently, a piecemeal approach, which nonetheless had support in the jurisprudence, was adopted. The problem, while somewhat simple in statement, defies

simple solution. What would a willing buyer pay for the physical facilities within the City in addition to the right to exercise the 64-year, nonexclusive franchise to operate that went along with the property, presuming there was a willing seller? The Commission answered the question as follows:

The Commission first found that the value of the system itself could be evaluated fairly only by taking the physical property and the franchise together. This was based on the premise that the conglomeration of poles, wires, and conductors was worth little unless viewed as an income-producing unit. Likewise, the franchise was worth little unless viewed as a legal right to produce income. Hence, the two items were viewed together through the medium of capitalizing income. In short it was the Commission's intent to determine what amount of money invested at a predetermined rate of return would produce the amount of net income attributable to the operation of the seized property under the rights of the franchise.

The Commission began with the gross revenue of the Power Company from its city operations over an annualized twelve-month period. Since the expropriated lights and poles represented only a minute portion of the total income-producing unit, namely the total integrated power company, the expenses attributable to the property within the City had to be derived from property outside the City which was not in fact being seized. As an indication of the importance of the Thibodaux business to the total structure of the Power Company, the Commission took the ratio of the peak kilowatt load in the City of Thibodaux to the peak load of the total Power Company system. The resulting figure, i. e. 0.0025, represented the degree to which the City benefitted from the expense of the whole

system. This percentage was then taken of the total transmission, distribution, general administrative, and depreciation expense of the whole system and the resulting figures deducted from the gross income. That figure was adjusted for taxes and then capitalized at 5.92% representing the Commission's ratio of total net income to total net investment. The capitalization figure was $482,686.00. This was the composite value to a willing buyer of the property taken and the franchise to operate that property.

In order to achieve separate values for property and franchise, the Commission adopted the City's expert valuation of the physical property by adopting the Power Company's inventory on a cost of reproduction new, less accrued depreciation, or $165,654.00. This subtracted from the capitalized figure was $315,031.00. Since the only other thing of value being taken was the franchise, the Commission concluded that this must be the value of the franchise.

At this point the Commission had evaluated the property expropriated at a given date, but without considering the prospect that the net income capitalized might increase in the future due to future growth of the area under condemnation. This Court in both the original and amended charge to the Commission had cautioned that future growth had value and was to be considered but only to the extent of its reasonable evaluation. The Commission rejected the Power Company's proffered evidence on future growth with the finding that, while there was real evidence of future growth, there was no reasonable certainty of its present value and consequently rejected any specific evaluation of it.[10a]

As to severance damages the parties took, as they have

[10a] See Report of the Commission, P. 18.

throughout this proceeding, widely divergent views of valuation. Severance damages may briefly be described as the loss of the value of the remainder of the system due to its future inability to use the expropriated property. For example, a generator which supplied power to a distribution system is rendered somewhat useless if the distribution system is expropriated even though the expropriation does not touch the generator. Its ability to produce income is impaired. Of course, the valuation of the loss is adjusted accordingly to the ability to convert the unused generator to other income-producing uses. The City said that since so small a portion of the total system was being taken, there were in fact no severance damages at all. The Power Company hypothecated that the total system would be rendered progressively useless and projected what would have to be invested to continue income production. Once the rate was established it was applied to the Thibodaux expropriation for that limited valuation. The Commission rejected both as unrealistic and viewed the surrounding property which directly contributed to the Thibodaux property as being directly affected by the expropriation. It found that Thibodaux's total power use for the affected area represented 7.9% of the depreciated value of the substation as severance damages, or $17,380.00.

As to consequential damages, the Commission strictly followed the Court's amended charge. The Commission took the estimated cost of two by-pass lines and valued the consequential damages at $99,575.00. It refused the added cost of maintenance of the new lines as consequential damage on the grounds that the Power Company would be adequately compensated by the new business opened up by the new lines.

The total valuation was $599,640.00. Both parties objected to every finding.

The City objected to the valuation of the franchise on the grounds that it did not represent the market value of the franchise. More specifically, the City objected that the Commission's methods of valuation by capitalization of income was incorrectly used. This was due, according to the City, to the use of the income figure of $121,000.00 as gross income. The City urged that the Commission should have applied its 0.0025% figure to the total income of Power Company in order to determine the income directly attributable to the condemned property. The City also complained that the consequential damages were not proved to any reasonable certainty.

The Power Company objected that in arriving at the net income figure, the Commission had duplicated expense figures through a misapprehension of the Seal Report analysis of Distribution Expenses and General & Administration Expenses. It also urged that in valuing the severance damages to the affected sub-station, the Commission should have used the ratio of the City's *use* of electricity to the *capacity* of the sub-station rather than the City's use to the present output of the sub-station. Its principal objection was to the Commission's disallowance of future growth as a determining factor in valuing the franchise. The Power Company observed that there was objective evidence in the record in the Seal Report which reflected the expected increase of income projected to the anticipated date of customer saturation. The Power Company adopted the Commission's reasoning and stated that if capitalized income was the determining factor then it was possible to capitalize the expected future income from future growth and reduce it to present value.

After briefs and argument, this Court referred the matter back to the Commission on special interrogatories.

The nature of the interrogatories indicates the Court's concern with the value of the franchise as fixed by the Commission. The Court inquired of the Commission what consideration it had given to the factors of non-exclusiveness of the franchise and the fact that it would only last 64 years. The Court also asked what consideration had been given to the fact that uncondemned property contributed to the income used as a base figure for capitalization of net income. It is evident that the City's objections prompted the referral to the Commission since each of these factors might, under some construction of the facts, materially affect the value of the franchise, certainly in a downward rather than in an upward manner.

In its Supplemental Report filed February 28, 1962, the Commission indicated that the lack of effective competition to the operator of the condemned facilities greatly reduced, if not eliminated, the impact of the non-exclusive quality of the franchise.[11] As to the fact that the franchise was to run for 64 years, the Commission calculated that the value of the franchise over 64 years and 9 months was substantially the same as the total value of the condemned distribution system measured by capitalized net income based on a net annual return for the twelve months ending April, 1961. Moreover, the Commission concluded that the franchise period was so long that it *was virtually immaterial in reducing or effecting the value of the* franchise.[12] As to the consideration of extra-urban facilities

[11] "Thus, within the limitations of the Court's amended charge, the competitive factors limiting the City of Thibodaux from acquiring the business and the statutory protection afforded Louisiana Power & Light Company in its business area, the Commission concluded that the non-exclusive nature of the franchise should have little effect on its value." Supplemental Report of the Commission, P. 4.

[12] "The Commission was and is of the opinion that the only evidence in the record tends to support the fact that the period of 64 years and 9 months is long enough to support a value for the franchise that is not diminished by the fact that some of its period had run." Supplemental Report of the Commission, P. 6.

in determining the gross income attributable to the intra-urban facilities, the Commission stated that it had considered the costs of such extra-urban facilities at every stage of its calculations and, in any event, calculating the gross income on the ratio of City customers to total customers resulted in a greater net income.[13] Moreover the use of 0.0025 against the company-wide income resulted in the figure being almost identical with the figure used by the company as net income. Lastly it noted that a reduction of .0025% of the Power Company's peak demand and a .0034% of its total customers did not justify any greater severance damages than those allowed.[14]

Thus the Commission reconfirmed its original findings. Again the parties objected. After a hearing, this Court, as then constituted overruled the objections of the City and the Power Company with a general commentary that the franchise value seemed inordinately high and that it seemed that the Power Company had fared too well. However, since the Court felt it could not say with assurance that an injustice had been done after viewing the record as a whole, it accepted the Commission's valuation. Thereafter the Court held a hearing on Commissioners' fees and subsequently set them. The Power Company moved to fix the costs it had incurred.

After the Court, as presently constituted, ascended the bench both parties moved for a new trial and the defendant for the assessment of costs, among them being a bill for $30,000.00 experts' fees. Except for fees and costs these matters were heard and submitted, the Power Company introducing additional evidence on the value of future growth based upon actual experience.

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[13] See Supplemental Report of the Commission, PP. 6-7.
[14] Supplemental Report of the Commission, p. 8.

The positions of the parties, now thrice urged, argued and briefed, have a familiar ring. The City says that the franchise right on a non-exclusive basis, with only 64 years to run, to serve not quite 900 people with electricity, could never be worth so much as the Commission says. The City also says that severance damages are either not compensable at all, or are not reasonably certain of assessment. The Power Company now directs its attack principally against the Commission's failure to award anything for the value of future growth. Essentially, the parties disagree on the philosophy of valuation of this peculiar sort of property being expropriated.

Confronted now with the inevitable necessity of decision, the Court must first observe that the parties have had their day in court, and then some. The Court has read and re-read the briefs and cited authorities of counsel for both parties. It has, as indicated, given great weight to the fact that the present posture of this case, legal and factual, is the result of numerous conferences, innumerable briefs and extended argument. At this stage, any Court is most reluctant to re-evaluate the conclusions based on so much that has given before. Thus, with a caution born of appreciation for the legal eminence of the counsel in this case, this Court briefly sets out the legal considerations which it understands to have occupied Court and counsel over the years of this litigation.

As to the position of the City that the Commission has given value to business profits or opportunity, contrary to the law of Louisiana, two things may be said. The cases cited by the City's counsel deal primarily with the condemnation of realty.[15] Briefly stated, the law of Lou-

[15]See generally State v. Sauls, 234 La. 241, 99 So.2d 97; State Through Department of Highways v. Central Realty Investment Co., 238 La. 965, 117 So.2d 261; State Through Department of Highways v. Hub Realty Co., 239 La. 154, 118 So.2d 364.

isiana says that you may not look to the future to judge the value of the property taken. The Court understands the law to be that when valuing a piece of land, one may not divine whether it may someday have an ice cream parlor or a federal reserve bank on it.[16] Similarly when the State, under its sovereign power seized property with a hardware store upon it, one may not presume that the state is going into the hardware business and thus evaluate the business itself and future earnings from that business. Where only land is involved it is simple to examine comparable sales of surrounding property to determine value since land has value depending on its location rather than the skill and ingenuity of its owner under condemnation.[17] Hence an acre of land on Canal Street in New Orleans is worth more than an acre of land in the salt marshes even though owned by the same person.

However, the instant situation presents a different case. The City is seizing this property to use it in the same manner and for the same purpose as its present use. The City is in fact seizing a going business to continue it as a going business. Moreover, there are no similar sales in the area by which to test the sales price.[18] The City is not

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[16] See In Matter of Morgan R. & S.S. Co., 32 La.Ann. 371, 376, apprvoed State v. Levy, 136 So.2d 35.

[17] See the language of the trial judge approved and affirmed in State Through Department of Highways v. Hub Realty Co., 239 La. 154, 118 So.2d 364. See also In Matter of Morgan R. & S.S. Co., supra, and State Through Department of Highways v. Lewis, La.App. 142 So.2d 652. To this must be added the caveat of the Louisiana Supreme Court in State v. Sauls, 234 La. 341, 99 So.2d 97, 102:

> "We have also stated * * * that rental income derived by the owner, and value of business conducted upon expropriated premises, while not the sole measure of compensation, may be considered along with other factors in arriving at the market value * * *." Citing many cases.

It appears that while the State need not pay for the business taken when involved with a seizure of realty, nevertheless the value of the business may be taken into account in determining the market value.

[18] The absence of comparable sales in the area gives rise to the approach taken in this case in accordance with the express law of Louisiana:

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buying the poles, lines and equipment to clear them away and build a school. The City wants the Power Company's distribution system and its customers. It is in this light that the "willing buyer-willing seller" concept must be viewed and rationalized to fit the novel circumstances of this case. Undoubtedly this was the view of the District Court which issued the two charges to the Commission. But the problem is how to value a conglomeration of poles and wires and transformers and franchise which make up a going business when it is the business that the buyer wants?

The law of Louisiana says that when the State builds a road and must destroy a gasoline station to do it the state need not pay for a gasoline station because the land and a building is what it wants and what it gets, not a gasoline station business.[19] This Court has had to make an "Erie calculation" of the law of Louisiana.[20] The judg-

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[18] Continued

"If evidence of similar sales is not available, the value of the land expropriated must be determined by other means, generally the testimony of experts." State Through Department of Highways v. Hub Realty Co., supra 118 So.2d at 368.

The Court takes judicial notice of the fact that in March of 1963, the City of Lafayette, Louisiana, expropriated the facilities of the Gulf States Utilities Co. within the limits of that City for $740,173.00. The taking involved the taking of the customers as well as the physical facilities. The number of customers involved was 460. To this must be compared the fact that the City in the instant suit in taking 828 customers as of the cut-off date of April 1, 1961, a a total value here determined to be $1,379,558.00. The arm's length transaction in the City of Lafayette case indicates, at least, that the present value put on the Power Company's customers is not as exaggerated as the City would suggest. The City of Lafayette has paid $1,609.07 per customer while the City in this case is asked to pay $1,667.34 per customer.

[19] See State Through Department of Highways v. Lewis, La.App., 142 So.2d 652. It is significant to note that in the Lewis case, the Court rejected the "income production method" of valuation because there were preferable methods of valuation available, namely comparable sales in the area. It should be observed once again that the absence of comparable sales in the area counseled the method used in this case. See Footnote 18 supra.

[20] That this diversity case is ruled by the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, is not to be questioned particularly since the Supreme Court's decision in this very case,

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ment of this court, throughout this litigation, has consistently been that when it is the business itself which is being seized, it must be valued in the only way businesses can be valued, i. e., according to its ability to produce income. To this must be added the compelling fact that the statute under which this expropriation is made states that the municipality must pay the "value of the property plus all damages sustained in consequence of the expropriation." La.R.S. 19:101, LSA. The City's citation of numerous authorities to the effect that consequential damages are not allowed under Louisiana law founders on the specific language of the statute.

The Power Company, on the other hand, says that, accepting the law as stated and the Commission's method of valuation, whole value has not been given. The Power Company says that in valuing a business one does not look solely to the past record of income production but rather one must look to the reasonable expectation of improving income production by future growth. The impact of this reasoning can be understood by viewing the record.

In its original charge to the Commission, the District Court treated the subject of future growth as follows:

> "In determining the market value of this privilege (franchise) the commission will be guided by comparable sales in the recent past, if any. Otherwise,

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[20] (Continued)

see 360 U.S. 25, 40, 79 S.Ct. 1070, 3 L.Ed.2d. 1058, dissenting opinion of Justice Brennan. More to the point, it was the opinion of the dissenting Justices in this case that the District Court should have made its projection of Louisiana law without the aid of the Louisiana courts on the question of the applicability of the Louisiana condemnation statute here in issue * * * On the question of the proper method of valuation in this case the lure of abstention is present but unavailable since the difficulty of deciding the state law question is no justification for abstention. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 39, 79 S.Ct. 1070, 3 L.Ed.2d 1058; Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9.

> evidence of actual earnings from the affected area may be considered, together with expert testimony. Evaluations of future growth and guesses about anticipated future earnings, being too speculative, must be excluded."

The Power Company objected to this charge and in the Amended Charge, the above language was altered by this Court in the following particular:

> "Future growth, when proved to a reasonable certainty, may also be considered, but mere guesses about anticipated future earnings, being too speculative, must be excluded."

This demonstrates that the District Court precisely understood the Power Company's position and accepted it, with the caveat that the value of the future growth had to be ascertainable to a reasonable certainty. This Court finds itself in agreement with this particular charge as being perfectly consistent with the tenor of the charge taken as a whole relying, as it does, on income production as the principal means of valuing the condemned property.

It is important to note how the Commission treated this charge in its findings. In denying any value for future growth, the Commission made the following statement at p. 18 of its first report:

> "*FUTURE GROWTH.* Mr. Seal in his report has included a computation of future growth (see Seal Report, pp. 12-13) in the portion of the City of Thibodaux wherein is located the physical property subject to this expropriation. (See also the Transcript pp. 112-116). He has placed a value of $1,041,516.00 on the increase in the worth of the business to arrive at a total value of $1,863,582.00 for the physical property and franchise in the area subject to this expropriation. This is the value as-

> signed to the property and franchise with the company serving the area at a saturation point of 1200 customers and as annual kilowatt hour sales in the area of 10,320,000. Seal Report, p. 13. In view of the fact that this value is a value at some time in the future, it is clearly not the value today. Mr. Helfman offered no evidence either in exhibits or testimony with regard to future growth.
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> "The Commission recognizes that this growth would have some value but the record does not reveal evidence of its value as of the present time. Additionally, the defendant in argument refers to the value of the property and franchise in the City of Thibodaux based on future earnings 'shown to a reasonable certainty' as $1,863,582.00 and urges consideration thereof but does not pray for an award for future growth. Therefore, the Commission makes no award for future growth."

In its second and supplemental report, the Commission made the following statement touching the matter of future growth:

> "It should be kept in mind that this latter figure [value assigned by Commission to franchise] does not include any allowance for future growth under the franchise. Certainly the Commission was and is satisfied that its value of $317,031.00 ($317,-032.00) assigned to the franchise in the Report is conservative."

This Court, in its reasons for judgment overruling the objections to the Commission Reports stated with regard to future growth:

> "As to the denial of the defendant's claim for future growth, the commission's findings are clearly supported by the evidence, or, more precisely, the lack of evidence."

This Court finds the Commission's reasoning (or the lack

of it) in denying future growth unconvincing. The Commission was charged by this Court to evaluate future growth if it could be done to a reasonable certainty and consequently, it is wholly immaterial whether the Power Company prayed for it or not. Conceding it had some value, on the grounds that there was no evidence of present value appears inconsistent with the "modus operandi" of the Commission itself. In capitalizing income based on prior earnings, the Commission made a necessary finding that the past income would continue into the future. Note in particular the calculations on Page 5 of the Supplemental Report of the Commission.

If all that is lacking in the Commission's determination is the present worth of future growth, then the Commission's finding is patently erroneous. Since the Commission finds that future growth has some value and there is evidence in the record to support that value then there is no difference between projecting past earnings into the future and reducing to present worth and projecting reasonably certain future growth into the future and reducing it to present worth. The crucial issue would be whether there was any basis for making a projection of future growth. This question is factually established by the Commission's finding that future growth had some value. But there is more.

The Power Company's evidence of future growth was in the form of expert testimony based on a report of projected estimates of customer increase up to a point of saturation in the area affected by this expropriation. This report of projected saturation was prepared by the City's experts.[21] Hence the City had endeavored to determine when the affected area would have the maximum number

[21] See Barnard & Burk Report.

of customers using the maximum number of kilowatt hours. The Power Company's experts then projected the increase in net income eventually to be derived from such situation and indicated that this was "future growth". Based as it is on the City's estimates, the Power Company's expert's opinion is entitled to substantial weight. The fact that the City's report reflects that there will be more customers in the future to use more electricity is certainly confirmation of the Commission's findings that future growth had substantial value.

Owing to the time lag between the valuation date in the Commission's report and the date of the hearing of the instant petitions, Power Company now goes forward in an attempt to prove that time has confirmed the estimates of future growth, or in fact has shown them to be too conservative. In the Power Company's exhibit Seal P-7 and Mr. Seal's oral testimony are found the fact that the area under condemnation has acquired 42 new customers since the original cut-off date of April 30, 1961, by September 30, 1962, and has increased revenue from the base period of $115,936.00 to $140,524.00 at September 30, 1962. These figures are taken from the company's books. Mr. Seal testified that the increase of revenue and kilowatt hours was due to the increase of electricity used by the former customers and the additional customers since the cut-off date. Of this evidence two things may be said.

First of all these figures are admissible, to the extent mentioned above, to prove nothing more than a validation of the calculation as to future growth in the condemned area.[22] Secondly, while it may be argued that business loss is not compensable under Louisiana law, and to that extent might not be cognizable by this Court in fixing an award, there is no doubt in the Court's mind that,

[22] See Seal Report, P. 6.

under the circumstances of a condemnation of an electrical utility as an electrical utility to be operated as such, these facts of future growth must be taken into consideration in fixing the present value of the whole system to a willing buyer.

The final problem is how to give effect to the value of future growth. On the one hand is the argument of City's counsel that the adoption of Seal R-7 amounts to awarding the Power Company the full value that might ever accrue to Power Company by paying for all the future profits. This, says city's counsel, is unwarranted from the willing buyer-willing seller viewpoint. On the other hand, denial of any value to future growth is equally in contravention of Louisiana Law, as this court reads it. The solution lies somewhere in the middle of a legal problem that is "res nova" in its application so far as this court can conclude from the statute and jurisprudence of Louisiana.

Since, as has been mentioned repeatedly, future growth, by the law of this case, has value only if provable to a reasonable certainty, it is necessary to look to the evidence in the record. By that same token, since the Court gives great weight to the prior history of this case, it is necessary to follow the "modus operandi" of the Commission so much as is possible. With those two considerations in mind, the Court concludes that future growth can best be evaluated by using the Commission capitalization method for determining present value and its interest rate on the one hand and the evidence of incremental Net Income attributable to future growth demonstrated by the initial Seal Report on the other in order to value future growth within the four corners of the Court's charge to the Commission and the evidence adduced at the hearings.

The Court has gone to great pains to indicate the

wisdom and legality of the Commission-approach to valuation. The Court must similarly point out that the only evidence of Net Income affected by future growth was introduced in the initial Seal Report[23] and stands uncontradicted. Previously it was observed that the Commission's rejection of such evidence as lacking present value is unsound. The Seal Report figure for increase in Net Income due to future growth is $47,389.00. It is necessary only to capitalize this at the Commission's rate of 5.92% and reduce it to present value on the basis of the 64 years left to run in the franchise. This, the Court concludes, properly reflects the legal application of the Commission formula as defined by this Court's charge to the evidence in the record. The resulting figure is $781,918.00.

It remains only to add this figure to the determinations already made by the Commission to arrive at the ultimate award. Close analysis of the valuation given severance and consequential damages convinces this court that these, like the Commission approach to present value, must be confirmed and adopted as the findings of this Court. The net award becomes:

MARKET VALUE OF EXPROPRIATED PROPERTY

Physical property		$ 165,654.00
Franchise . . .		
Value of present income	$315,031.00	
Value of future growth	781,918.00	1,096,949.00
Severance damages		17,380.00
Consequential damages		99,575.00
Total Award		$ 1,379,558.00

[23] Seal R-6 Green Book P. 13.

This Court observes that while the point at issue may be novel to Louisiana jurisprudence, it has been faced elsewhere and awards for future growth, particularly where a public utility is concerned, countenanced. See Kennebec Water District v. City of Waterville, 97 Me. 185, 54 A. 6, 60 L.R.A. 856, East Boothbay Water District v. Inhabitants of Town, 158 Me. 32, 177 A.2d 659, Onondaga County Water Authority v. New York Water Service Corp., 285 App.Div. 655, 139 N.Y.S. 2d 755. While this case is exclusively a question of Louisiana law, it is a question upon which Louisiana courts have not spoken definitely and this Court feels constrained to note how other courts have treated the question when faced with it. While not binding upon this Court, those decisions confirm this Court's conclusions as to the valuations of future growth.

The figures used in the final computation satisfy the Court that every element of value set out in the Court's Supplemental Charge has been computed and satisfied. The composite figure represents to the Court a reasonable basis for a judgment of market value under Louisiana law under circumstances in which comparable sales in the area are not available and expert testimony and capitalization of earnings are the alternative methods provided by Louisiana law.

Lastly, this Court draws attention to the sale of the Lafayette Power facility to the City of Lafayette, Louisiana. Initially this Court points out, as before, that this is not in fact a comparable sale, evidence of which is before the Court. However, having taken judicial notice of such sale, the Court hastens to point out that this arm's length sale resulted in a cost of $1,609.07 per customer in the condemned Lafayette area. The resulting cost in the Thibodaux area under this Court's award is $1,667.34 per

customer. At the very least this demonstrates that the award in this case is far from inordinate. Quite to the contrary, it impresses this Court as being in full conformity with the law. The law on this subject is not free from every cloud of doubt but in this Court's judgment the award does justice between the parties on the basis of the Louisiana law and amounts to a reasonable compensation for an electrical utility which the City of Thibodaux is seizing to operate as its own.

In recapitulation, this Court does adopt the Commission's formula and findings as to present income projected by the capitalization method as well as its findings as to consequential and severance damages. The Commission interest rate of 5.92% in its capitalization formula is used to compute present value and future growth, thus rejecting the interest rate more favorable to the Power Company, namely 4.55% used by the Power Company expert Seal. Thus it is that the only change effected by the Court covers a valuation for future growth which is found to be supported by the record and in keeping with Louisiana law.

This Court will then enter a judgment in the amount of $1,379,558.00 to the defendant, Louisiana Power & Light Company, and set down for immediate hearing the question of the expenses for expert's fees expended by the Power Company.

Judgment accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22,000

D. C. Docket No. 6444—Civil Action

CITY OF THIBODAUX,
Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, BELL, and DYER, Circuit Judges.

JUDGMENT

This cause came to to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed in part, and that this cause be, and the same is hereby remanded to the said District Court with direction, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellant,

City of Thibodaux, be condemned to pay one-half of the costs of this cause in this Court, and appellee, Louisiana Power & Light Company, be condemned to pay one-half of said costs for all of which execution may be issued out of the said District Court.

Issued as Mandate: Jul 3 1967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,000

CITY OF THIBODAUX,
Appellant,

v.

LOUISIANA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 23, 1967)

(On Petition for Rehearing)

Before BROWN, BELL, and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.

APPENDIX D

F.R.C.P., Rule 69. (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

* * * * *

F.R.C.P. 71A. (j) Deposition and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less

than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

* * * * *

R.S. 19:101. Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and waterworks plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation.

* * * * *

R.S. 19:102. Upon receipt of the petition filed pursuant to R.S. 19:101, the judge shall appoint six commissioners, who shall be property owners and residents of the parish. The commissioners shall carefully examine the property sought to be expropriated and shall make a detailed appraisal of its value, showing the separate valuation of the land, the buildings, the machinery, and the other property sought to be expropriated.

Before beginning performance of their duties, the commissioners shall take an oath to faithfully and impartially discharge their duties.

* * * * *

R.S. 19:103. The commissioners shall make a report to the court of their investigation and estimate a valuation within fifteen days after the notification to them by the clerk of their appointment. The clerk shall then deliver to the sheriff a notice to both parties directing them to show cause within ten days after service of this notice why the report of the commissioners should not be approved by the court, and the sheriff shall serve this notice upon all parties to the proceedings as in ordinary cases.

* * * * *

R.S. 19:104. If either party objects to the report of the commissioners, he shall file with the clerk a petition

of opposition setting forth the objections and the reasons therefor. This opposition shall be tried and decided after hearing the evidence of both parties, as in ordinary cases.

* * * * *

R.S. 19:105. No appeal from the judgment of the lower court made by either party shall suspend the execution thereof. The payment of the amount decided on in the lower court by the municipal corporation to the owner or the deposit of that amount in the hands of the sheriff subject to the owner's order entitles the municipality to the title to the property in the same manner as a voluntary conveyance would do.

If any change is made by the final decree in the decision of the cause, the municipality shall pay the additional assessment or may recover the surplus paid, as the case may be.

* * * * *

R.S. 19:106. If a tender is made by the municipality of the true value of the gas, electric light, or water works plant to the owner thereof, before proceeding to a forced expropriation, the costs of the proceedings shall be paid by the owner.

* * * * *

R.S. 19:107. Whenever any gas, electric light, or water works plant encumbered with mortgages or privileges of any kind is expropriated by any municipality, it passes to the municipality free and clear of all incumbrances. However, the amount decreed to be paid therefor shall be paid by the corporation into the court within six months from the date of final judgment therein and dis-

tributed to the mortgage and privileged creditors according to their priority. In the event the municipal corporation fails to pay the amount fixed by the judgment of expropriation within six months after its rendition, the judgment becomes null and void and the municipality is liable for all damages suffered by reason of its failure to comply with the terms of the expropriation judgment.

* * * * *

Louisiana Constitution, Article I, Section 2. No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.

* * * * *

Louisiana Constitution, Article 4, Section 15. No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid.

* * * * *

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Article I, Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

* * * * *

R.S. 33:151. Whenever one-third in number and in value of the bona fide owners of any lots or land, lying contiguous and adjacent to the territorial corporate limits of any city or town, the city of New Orleans excepted, desire that such lots or land be annexed to and included in the territorial corporate limits of any such adjacent and contiguous city or town, so as to constitute a part thereof, they shall present to the mayor and governing body of such city or town as constituted by law, by whatever name called, a petition in writing signed by them, setting forth their desire that said lots or land shall be annexed to and included in the territorial corporate limits of such city or town, so as to constitute a part thereof, and therein also fully setting forth the boundaries and accurate description of such lots or land which they desire to be annexed to and included in the territorial corporate limits of such adjacent and contiguous city or town.

* * * * *

R.S. 33:152. Such petition shall be accompanied with a proces verbal and plat of survey of such lots or land desired to be annexed to and included in the territorial corporate limits of such city or town made by the parish surveyor of the parish in which the city or town is situated. Such survey and proces verbal and plat thereof, to be first

made by such surveyor for such purpose, shall set forth the boundaries and accurate description of such lots or land desired to be so annexed, and shall be by such surveyor certified to be correct.

* * * * *

R.S. 33:153. Upon presentation as provided in R.S. 33:151 and 33:152, the petition and proces verbal and plat of survey shall be recorded and transcribed upon the public record-book wherein the ordinances or official proceedings of the municipal authorities are usually recorded, and also permanently preserved among the official records of the city or town. The municipal authorities may then order an election to be held by the qualified electors residing in and upon the lots or land proposed to be annexed to such contiguous and adjacent city or town, submitting the proposition, to be voted on at such election, whether they desire that such lots or lands shall be annexed to and included in the territorial corporate limits of such contiguous and adjacent city or town.

* * * * *

R.S. 33:154. Such election shall be held under the general election laws, and preceded by a notice of ten days or more in one or more newspapers published in such city or town, or if there be none by posting as required in sheriff's and constable's sales. The notice shall set forth specifically the manner in which such election is to be conducted, and the boundaries and description of such lots or land proposed to be annexed to and included in the corporate limits of such city or town. It shall designate the polling place and the names of the commissioners of election, as well as the manner of counting the votes and making the returns.

* * * * *

R.S. 33:155. At the election no person shall be allowed to vote except those who are qualified to vote under the general election laws, and who reside in and upon the lots or land proposed to be annexed to and included in the territorial corporate limits of such city or town.

* * * * *

R.S. 33:156. The returns of the election shall be made to the municipal authorities of the city or town within forty eight hours after the closing of the polls at the election. Such returns shall likewise be recorded and transcribed in the public record book wherein the ordinances or official proceedings of the municipal authorities are usually recorded; and also permanently preserved among the official records of the city or town. The municipal authorities shall within ten days thereafter make public proclamation of the result of such election by publication for ten days in one or more newspapers in the city or town, or if there be none by posting as required in sheriff's and constable's sales.

* * * * *

R.S. 33:157. After the expiration of the publication of the result of the election, in a majority in number and value of the qualified electors residing in and upon the lots or land proposed to be annexed to and included in the territorial corporate limits of the city or town, voting at such election, have voted in favor thereof, the municipal authorities of the city or town may then order an election to be held under the general election laws by the qualified electors residing within the corporate limits of the city or town as theretofore established, submitting the proposition to be voted on at such election, whether they consent to such annexation to the corporate limits of the city or town.

* * * * *

R.S. 33:158. Such election shall likewise be preceded by a notice of ten days in one or more newspapers published in the city or town, or if there be none by posting as required in sheriff's and constable's sales. The notice shall likewise set forth specifically the manner in which the election is to be conducted and the boundaries and description of such lots or land proposed to be annexed to and included in the territorial corporate limits of the city or town, and also designate the polling place and the names of the commissioners of election, as well as the manner of counting the votes and making the returns.

* * * * *

R.S. 33:159. At such election no person shall be allowed to vote except those who are qualified to vote under the general election laws and who reside in the corporate limits of the city or town as theretofore established and constituted.

* * * * *

R.S. 33:160. The returns of such election shall be made to the municipal authorities of the city or town within forty-eight hours after the closing of the polls. The returns of election shall be likewise recorded and transcribed in the public record-book wherein the ordinances or official proceedings of the municipal authorities are usually recorded; and the municipal authorities shall within ten days thereafter make public proclamation of the result of such election by publication for ten days in one or more newspapers published in the city or town, or if there be none, by posting as required in sheriff's and constable's sales; and if a majority in number and value of the qualified electors residing in the territorial corporate limits of such city or town as theretofore established and constituted,

voting at such election have voted in favor of the proposed annexation of such lots or land, the lots or land proposed to be annexed, shall, from the expiration of the proclamation of the result of the election, be annexed to, included in and constitute part of the corporate limits of the city or town and be subject to the jurisdiction, control, and authority of the municipal authorities of the city or town as fully and to all intents and purposes as if the same had been originally included in the corporate limits thereof.

* * * * *

R.S. 33:161. No election proposing to annex to the corporate limits of any city or town the same contiguous and adjacent lots or land shall be held oftener than once in twelve months.

* * * * *

R.S. 33:171. The limits and boundaries of incorporated municipalities shall remain as established on July 31, 1946, but may be enlarged or contracted by ordinance of the governing body as hereinafter provided, the City of New Orleans excepted.

* * * * *

R.S. 33:172. No ordinance enlarging the boundaries of a municipality shall be valid unless prior to the adoption thereof a petition has been presented to the governing body of the municipality containing the written assent of twenty-five per cent in number of the resident property owners as well as twenty-five per cent in value of the property within the area proposed to be included in the corporate limits according to the certificate of the parish assessor. The valuation shall be certified to by the assessor according to the assessment of each of the owners signing the petition. Where there has been a change of ownership

since the last assessment of the property, the assessor shall certify the valuation of the present owner in accordance with the last assessment appearing on the rolls against any previous owner. In any case where the property of the present owner has not specifically been assessed the assessor shall estimate the assessed value of the property for the current year and certify the same as the value of the property.

Notice by publication shall be given once of the filing of the petition in some newspaper published or having general circulation in the municipality. No ordinance enlarging the boundaries of the municipality shall be adopted until ten days after the publication of the notice. Anyone desiring to be heard with reference to the proposed ordinance shall notify the clerk or secretary of the municipality in writing and the governing authorities before adopting any ordinance, shall grant such hearing.

* * * * *

R.S. 33:173. The ordinance enlarging the boundaries of the municipality shall not become operative until thirty days after it has been published once in a newspaper having general circulation therein. If there is no newspaper published in the municipality or having general circulation therein, written copies of the ordinance shall be posted in three public and conspicuous places in the municipality and same shall not become operative until thirty days after the posting.

* * * * *

R.S. 33:174. Any interested citizen of the municipality or of the territory proposed to be annexed thereto may, within the thirty day period before the ordinance

becomes effective, file suit in the district court having jurisdiction over the municipality, to contest the proposed extension of the corporate limits and the question shall be whether the proposed extension is reasonable. If the extension of boundaries is adjudged reasonable the ordinance shall go into effect ten days after the judgment is rendered and signed unless a suspensive appeal therefrom has been taken within the time and manner provided by law. If the proposed extension is adjudged unreasonable the ordinance shall be vacated and the proposed extension shall be denied, and no ordinances proposing practically the same extension shall be introduced for one year thereafter. A similar right of appeal from the judgment of the district court annulling the ordinance shall be granted the municipality or any interested citizen as hereinabove provided.

* * * * *

R.S. 33:175. If no suit is filed within the thirty day period, or if no appeal is taken within the legal delays from a judgment of the district court sustaining the ordinance, same shall then become operative and cannot be contested or attacked for any reason or cause whatsoever.

* * * * *

R.S. 33:176. To contract the boundaries of a municipality the same procedure shall be followed as outlined above and the same notice must be published and the same right of appeal to the courts is granted as is provided for in the case of the enlargement of the boundaries.

* * * * *

R.S. 33:177. Any number of persons interested in contesting the enlargement or contraction of the boundaries of a municipality may join in one suit for the purpose of

appealing to the district court from the ordinance adopted with reference thereto, and one bond by one of the litigants shall be sufficient if it otherwise complies with the laws. When more than one suit has been brought for either of said purposes, the district judge shall order them consolidated and tried as one suit.

* * * * *

R.S. 33:178. Where the boundaries of a municipality have been enlarged or contracted the ordinance with reference thereto must define with certainty and precision the territory which it is proposed to include in or to exclude from the corporate limits, as the case may be, and the ordinance must also define the entire boundary as changed.

* * * * *

R.S. 33:179. Where the corporate limits of municipalities have been extended or enlarged as hereinabove provided, the annexed territory, the inhabitants thereof, and the owners of property therein shall enjoy as to themselves and their property all the rights, immunities, and privileges granted and enjoyed by the citizens of the municipality to which the territory has been annexed.

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NO. 631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

LOUISIANA POWER & LIGHT COMPANY,
Petitioner

vs.

CITY OF THIBODAUX,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court first entered herein in 1957 is reported at 153 F. Supp. 515. That of the Court of Appeals on the appeal therefrom appears at 255 F.

2d 774. This Court's opinion on certiorari from the decision of the Fifth Circuit Court of Appeals will be found at 360 U.S. 25. The Louisiana First Circuit Court of Appeal's decision which followed this Court's opinion is reported at 126 So. 2d 24. The Louisiana Supreme Court denied certiorari. The more recent opinion of the District Court in this case appears at 225 F. Supp. 657. The Court of Appeal's opinion of which petitioner Louisiana Power & Light Company seeks review is published at 373 F. 2d 870.

QUESTIONS PRESENTED

1. Whether petitioner's parish (county) police jury franchise expressly excluding any operations "within the limits of any incorporated city, town or village" here entitles petitioner, on the basis of impairment of the obligation of contract, to any award

for the "present value of future growth" upon the expropriation by an incorporated city of petitioner's facilities located within the extended limits of the city.

2. Alternatively to Question 1, whether judicial construction of a state statute ante-dating petitioner's franchise in such manner as to deny petitioner an award for the "present value of future growth" within an area annexed into a municipality constitutes a Constitutionally protected impairment of the obligation of contract.

3. Whether the Federal practice under Rule 71A, F. R. Civ. P., controls the making of a post-judgment deposit of the amount of an expropriation award in a proceeding for condemnation under a state's power of eminent domain.

4. Whether petitioner, not having appealed from the judgment of the district court, may enlarge its rights or lessen those of respondent with regard to

whether there existed "necessity" for expropriation by respondent of petitioner's facilities.

5. Alternatively to Question 4, whether there is required remand to the district court for further consideration of the "necessity" of the expropriation.

STATEMENT

By its petition for expropriation (R. 6) filed February 4, 1957, in the 17th Judicial District Court for the Parish of Lafourche, Louisiana, the City of Thibodaux (hereinafter referred to as "City"), a duly incorporated Louisiana municipality, initiated these proceedings for the expropriation of the electrical distribution system of Louisiana Power & Light Company (hereinafter referred to as "power company") located within the City's corporate limits. The action was instituted pursuant to the express authorization of Louisiana Revised Statutes 19:101. The power company

removed the suit (R. 1) to the United States District Court for the Eastern District of Louisiana under the diversity of citizenship jurisdiction provisions of 28 U.S.C. 1441. Defendant answered (R. 15), and it was stipulated by the parties "that the seizure under Rule 71(a), F.R. Civ. P., will be used and that a commission of three will be appointed to assess value ****" (R. 27). The checkered history of this litigation then saw the district court stay further federal proceedings so that the state courts could pass upon the hitherto uninterpreted Louisiana statute authorizing the expropriation (La. R.S. 19:101) in the light of the power company's numerous defenses, including asserted impairment of the obligation of contract (R. 73; City of Thibodaux v. Louisiana Power & Light Co., E.D. La. 1957, 155 F. Supp. 515). After reversal of the abstention order by the

Court of Appeals, City of Thibodaux v. Louisiana Power & Light Co., C.A. 5 1958, 255 F. 2d 774, this Court granted certiorari, itself reversed the Court of Appeals decision, and held that the doctrine of abstention found proper application in this proceeding. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). That the City could expropriate the property in question was confirmed by the state tribunals, City of Thibodaux v. Louisiana Power & Light Co., La. App. 1st Cir. 1960, 126 So. 2d 24, cert. den. The case then returned to the United States District Court for the Eastern District of Louisiana, New Orleans Division, for determination of the compensation due the power company for the facilities expropriated.

Among the points at issue in the District Court was whether petitioner was entitled to an award for the

"present value of future growth", to be included in evaluation of the franchise. The Commission appointed to assess valuation concluded that it was not, and that there was no evidentiary basis for such an award. R. 874. Judge J. Skelly Wright, then presiding, agreed. R. 921. Following elevation of Judge Wright to the Court of Appeals, Judge Frank B. Ellis, at a motion for a new trial, received certain evidence proffered by petitioner with regard to its asserted entitlement to an award for future growth value. R. 943. On the basis that such an award was justified, Judge Ellis increased the award of the Commission, in which Judge Wright had concurred, from $599,640.00 to $1,379,558.00, all of the $781,918.00 difference being attributed to "present value of future growth" as an aspect of franchise value. R. 1045, 1048. The Fifth Circuit Court of Appeals, Judges Brown, Coleman, and Bell,